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## THE LIBYAN INTERVENTION: LEGITIMACY AND THE CHALLENGES OF THE ‘RESPONSIBILITY TO PROTECT’ DOCTRINE

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### 1. NEW DAWN

The potency of the phrase ‘The Arab Spring’ remains undiminished by its over-use since a young Tunisian man, Mohamed Bouazizi, set himself on fire on 18 December 2010. In much the same way as the domino effect of the fall of the Berlin Wall, references to the Arab Spring provide a short-hand description of the wave of public demonstrations and violent reprisals that have occurred, and continue to occur, across the entire Middle East. The fall-out of these events have also spread beyond the region; for instance, the *coup d’etat* in Mali (21 March 2012) and even the protests attendant upon the presidential election of Vladimir Putin in Russia have all been ascribed to this climatic event. Crucially, the Arab Spring has also resulted in the adjustment and re-alignment of global politics and alliances. No better example of this is provided by the undignified scramble by US politicians on both sides of the political divide to sunder their long-standing political, economic and military support of the regime of Egypt’s Mubarak. And, ultimately, it has required western powers to attempt reconciliation with political Islam, or at the least, with the alleged ‘moderate’ powers of the Islamic Brotherhood, who appear to have achieved their long-sought political ambitions through the ballot box.<sup>2</sup>

To a large extent, therefore, the end of Muammar Qaddafi’s tyranny and despotic rule in Libya may be subsumed into the wider politics of the region. And yet, Libya is different in one essential fact: the Arab Spring in Libya was played out with direct foreign military intervention.<sup>3</sup> Moreover, this was a

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<sup>2</sup> This accommodation with moderate Islam, of course, is neither unique nor radical. Turkey’s ruling party is exactly that: moderate and Islamic, and there has been no hesitation in accepting Turkey’s place in global politics, its position as a crucial member of NATO and, indeed, as a possible future member of the EU.

<sup>3</sup> There are, of course, comparisons to be made with other military interventions in the Middle-East, particularly Iraq. For a further discussion, reference may be made to:

## THE LIBYAN INTERVENTION

military intervention which had received the tacit approval of the UN Security Council. The defining difference is that the people of Tunisia and Egypt achieved their ambitions without this element of foreign, military, intervention. To put it in stark terms, there were no bombings of Tunis or Cairo by NATO warships or airplanes. As far as Libya was concerned, Qaddafi's hold on power was so entrenched that the momentous events of the Arab Spring would not have had the effect it did if it were not for,

...a controversial military intervention that has been variously described as everything from a neo-imperial regime change to a humanitarian rescue mission. It moved Libya's revolt and the entire Arab Spring into a new phase.<sup>4</sup>

The Tunisian and Egyptian revolutions – and revolution is the appropriate term – were, in this sense, autochthonous; foreign intervention did not mediate the momentous political changes that occurred.<sup>5</sup>

To what extent, therefore, was the NATO operation in Libya justified and justifiable? That this question is a crucial one, not just in terms of Libya but in a wider context, is neatly encapsulated in the inertia of the UN, no less in the face of events in Syria and the intransigence of the Assad regime but also in the Saudi Arabian intervention in Bahrain.<sup>6</sup>

## 2. LIBYA: THE JAMAHIRIYA

Qaddafi's brand of revolution in Libya had long been a thorn in international politics. Yet, it is necessary to set Qaddafi in the context of

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Ronald St John, "Libya is not Iraq: Preemptive Strikes, WMD and Diplomacy" (2004) 53:3 *Middle East Journal* 386.

<sup>4</sup> Lin Noueihed and Alex Warren *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of New Era* (New Haven, USA: Yale University Press 2012) p165.

<sup>5</sup> The term 'autochthonous', in its usage in Constitutional Law, refers to those constitutions of the 'new' Commonwealth states that were the product of negotiation, deliberation and proclamation of their independent legislative assemblies, rather than imposed upon them though the form of a 'grant' from the Foreign and Commonwealth office, contained in the UK Act of Parliament that conferred independence.

<sup>6</sup> Further references may be made to Lin Noueihed and Alex Warren *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of New Era* (New Haven, USA: Yale University Press 2012).

Libya's experiences of colonialism and exploitation.<sup>7</sup> It would not be exaggeration to state that the ebb and flow of 'Great Power' politics has swirled over Libya and its peoples since, at least the dawn of the modern era. The period following the end of Italian colonial rule after the Second World War was followed by even greater confusion, with the United Kingdom, France, the United States and the USSR vying for primacy of their strategic interests. The matter received a resolution of sorts with the UN General Assembly Resolution of 21 November 1949 which stipulated that Libya should become independent as soon as possible, by 1 January 1952 at the latest. As Pargeter puts it:

Libya was to be free at last. Yet for all the happiness this news engendered, it was tainted slightly by the fact that independence was a direct result of manoeuvrings on the part of the Big Powers, rather than of a hard-earned liberation struggle. Indeed, the Libyans had been relegated to the very lowest rung of the decision-making ladder – as with so much in their historical experience, independence was something that had happened to them and in spite of them.<sup>8</sup>

Qaddafi's rise to power as well as his subsequent gesture politics - from the proclamation of his Green Revolution<sup>9</sup>, to his support of the IRA, to the shooting of WPC Yvonne Fletcher, no less than the Lockerbie *affaire*<sup>10</sup> - must be seen in this context. The numerous attempts to reign in the charismatic and troublesome Libyan leader were merely met with even more defiance:

The nation should realise and the West must understand that we are not being affected by the blockade, the boycott, the air embargo or anything else. We hope that there won't be any relations at all

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<sup>7</sup> A more detailed discussion of these issues is to be found in the following: Ali Ahmida, *Forgotten Voice: Power and Agency in Colonial and PostColonial Libya* (Abingdon: Routledge, 2005); David Blundy and Andrew Lycett *Qaddafi and the Libyan Revolution* (London, Weidenfeld and Nicolson, 1987); Dirk Vandewalle *A History of Modern Libya* (New York: Cambridge University Press, 2006); Alison Pargeter *Libya: The Rise and Fall of Qaddafi* (New Haven, USA: Yale University Press, 2012).

<sup>8</sup> *Ibid*, p 33.

<sup>9</sup> The political ideology, if it may be termed as such, behind Qaddafi's *Green Book* (Tripoli: World Centre for the Study and Research of the Green Book, 1984) was nothing other than a continuation of Qaddafi's personality cult.

<sup>10</sup> The events surrounding the bombing of a Pan Am flight over Lockerbie on 21 December 1988 have been extensively rehearsed. See, for instance, Pargeter, above.

## THE LIBYAN INTERVENTION

between us and the West, that none of their goods get here, that we won't buy anything from [them]. What matters is that they spare us their evil and harm, and that the sea is between them and us. Good that we are rid of them as it were.<sup>11</sup>

To this intoxicating mix must be added (with the benefit of hindsight) the bizarre scramble by Western leaders to welcome Colonel Muammar Qaddafi back into global politics in the ten-year period or so before the NATO operations that terminated his rule.

For London and Washington, rehabilitating the Libyan leader from malevolent pariah to cooperative autocrat involved a controversial rapprochement with a man they considered responsible for numerous acts of overseas terrorism. But it was also hailed as a triumph for years of patient diplomacy designed to engage, not overthrow, a regime that almost from its very creation had stirred up international trouble.<sup>12</sup>

After Saddam Hussein's Iraq, the Taleban in Afghanistan and the mullahs of Iran, it seemed, mistakenly as events proved, that Qaddafi (and his son, Saif al-Islam Qaddafi) was a man with whom the West could do business.

In addition, a factor that is crucial in understanding the events in Libya, both during the Qaddafi regime as well as post-Qaddafi, is the tribal nature of Libyan society. Libya was not, and never has been, a one-nation state. What was true during the colonial period continued to be true after independence and during the Qaddafi regime. To this extent, there is a certainly symmetry between Libya and the other nations of the Arab Spring. It is possible to go further and consider this to be an emblematic facet of these nations, where a nexus of family-tribal-clan loyalties are prioritised above that towards the central State:

'We follow the ways of our forefathers, those who kindled wars and were faithful to the ties of kinship'.<sup>13</sup> This ... expressed the very

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<sup>11</sup> Speech by Muammar Qaddafi, Libyan television, 21 September 1993, quoted in: Alison Pargeter *Libya: The Rise and Fall of Qaddafi* (New Haven, USA: Yale University Press, 2012) p 157.

<sup>12</sup> Lin Noueihed and Alex Warren *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of New Era* (New Haven, USA: Yale University Press, 2012) p 166.

<sup>13</sup> Abid ibn al-Abras; see footnote below.

essence of an Arab's identity. Extended networks of relatives blurred seamlessly into tribe.<sup>14</sup>

The fault lines in Libya political society were, to a very large extent, submerged during the final months leading to the fall of the regime. Nevertheless, these fault lines did not miraculously disappear: with the defeat of the common enemy, the long-seething racial, tribal and clan tensions that had festered for generations have emerged to threaten whatever the political resolution may be, post-democratic elections. To the powerful mix of opposing loyalties may be added two factors. First, the presence of abundant weapons has given the various warring factions a potency that would not otherwise have existed. There have been numerous instances of this seizure of power and the contempt of central government, particularly of the National Transitional Council, as in the arrest and detention of lawyers acting for the International Criminal Court and the refusal to hand over Saif Al-Islam to the central authorities.<sup>15</sup>

The proliferation of weapons among the general population and especially amongst the *katiba* brigades,<sup>16</sup> has been remarked on in the Report of the Committee of Experts submitted to the Security Council in the aftermath of the NATO intervention.<sup>17</sup>

33. The distribution of arms to civilians and the appropriation of the content of weapons and ammunition storage sites by individuals and brigades resulted in the uncontrolled circulation of very large quantities of military materiel during the war. Additional military materiel was also delivered during the conflict from abroad and there were apparently no accountability measures to follow the distribution of this materiel on the ground.

34. Four months after the end of the conflict, a significant percentage of the civilian population is armed and the brigades control very large

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<sup>14</sup> Tom Holland *In the Shadow of the Sword* (London: Little Brown Group, 2012) p 232.

<sup>15</sup> The unpredictability of these small groups of ex-rebel fighters may be illustrated by the abduction of the president of the Libyan Olympic Committee on the 15 July 2012 (*The Times*, 17 July 2012).

<sup>16</sup> *Katiba* is the Arabic term used in Libya for the rebel brigades that fought the Qaddafi regime. These units varied in size and level of allegiance. Crucially, not all of the *katiba* have been disbanded and there is no realistic possibility of accounting for the stock of weapons possessed.

<sup>17</sup> S/2012/163 ([www.un.org/sc/committees/1970/](http://www.un.org/sc/committees/1970/)).

## THE LIBYAN INTERVENTION

quantities of weapons and ammunition stocks. The lack of a unified command over the *katibas*<sup>3</sup> and the absence of a national force to oversee the arms stocks represent considerable challenges in terms of post-conflict weapons management and control.

37. Finally, it is clear that a number of people seized the opportunity to make a profit by removing weapons from stores opened up during the conflict and selling them. Since the end of the conflict, the Panel has been made aware of information which indicates that individuals in Libya have made contact with foreign brokers in an attempt to sell military materiel.

Second, as in Saddam Hussein's Iraq, Islamic extremists who had been suppressed (through imprisonment, murder and torture) by Qaddafi were now free to act. It is a fact that in many essential respects, the only unifying feature lies in the adherence to a common religion. It is noteworthy, after all, that the demonstrators against despotism, cronyism and corruption throughout the region consciously echo the Qu'ranic injunction:

Account is demanded of those who oppress people and commit transgression on earth, unjustly. To them there is painful torment.<sup>18</sup>

As far as this latter point is concerned, those who might be tempted to point to the resurgence of the Islamists in Iraq, Egypt and Tunisia as a benchmark to measure the legitimacy of intervention, may be heartened by the fact that events so far indicate that the role of religion may not be the defining factor of post-conflict Libya. Despite the activities of Islamist groups such as *Al Watan* (led by Abdul Hakim Bilhaj, the former jihadist fighter who is now suing the British government for complicity in rendition and torture)<sup>19</sup> it appears that the Islamist parties have made little headway in the country's first democratic elections.<sup>20</sup>

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<sup>18</sup> *Qur'an*:42.42 – 3.

<sup>19</sup> Richard Norton-Taylor and Ian Cobain, "Libyan dissidents sue MI6 officer over abduction and torture claims" *The Guardian*, 31 July 2012: [www.guardian.co.uk/world/2012/jan/31/libyan-dissidents-sue-mi6](http://www.guardian.co.uk/world/2012/jan/31/libyan-dissidents-sue-mi6).

<sup>20</sup> Although the new Prime Minister, Mohammed Magarief, is described as an Islamist (albeit a 'moderate') Libya's first free and fair elections (7 July 2012) has resulted in the dominance of the broadly secular National Forces Alliance: [www.bbc.co.uk/news/world-africa-19204111](http://www.bbc.co.uk/news/world-africa-19204111).

### 3. SECURITY COUNCIL ACTION

Events in Libya by 2010 had begun to cause concern. It was clear that the re-integration of Libya into the political order was a failure. Internally, too, there began to be an intensification of the repressive tendencies that had always sustained the regime. Matters came to be focussed on Security Council Resolution 1970 (2011), whereby the Security Council expressed grave concern over the situation in Libya including the violence and use of force against civilians and the gross and systematic violation of human rights. The Resolution expressed grave concerns regarding, *inter alia*, the use of force against civilians and deplored,

...the gross and systematic violations of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government.<sup>21</sup>

Within this context, the Security Council imposed specific measures on Libya including the arms embargo, which related to arms and related *materiel* of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, in addition to the provision of armed mercenary personnel. The Security Council also imposed an asset freeze which related to all funds, financial assets and economic resources which were owned, or controlled directly or indirectly, by the designated individuals or entities listed in the resolution. Further, the Council decided that the asset freeze and travel ban should apply to the individuals and entities designated by the Committee involved in or complicit in ordering, controlling or otherwise directing the commission of serious human rights abuses against persons in Libya.

This was rapidly followed by Security Council Resolution 1973 (2011) whereby the Council strengthened the enforcement of the arms embargo and expanded the scope of the asset freeze to include the exercise of vigilance when doing business with Libyan entities, if States had information that provided reasonable grounds to believe that such business could contribute to violence and use of force against civilians.<sup>22</sup> Additional individuals subject to

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<sup>21</sup> S/RES/1970 (26 February 2011).

<sup>22</sup> S/RES/1973 (17 March 2011); the Resolution was adopted with 10 votes in favour, none against and 5 abstentions. Voting in favour: Britain, France, United States (SC permanent members) and Bosnia-Herzegovina, Colombia, Gabon, Lebanon, Nigeria,

## THE LIBYAN INTERVENTION

the asset freeze and the travel ban were listed in the resolution. Resolution 1973 (2011) also included the authorization to protect civilians and civilian populated areas under threat of attack in Libya and authorised UN Member States, acting alone or through regional organisations to “take all necessary measures to protect civilians under threat of attack.” Crucially, Resolution 1973 (in paragraphs 6 – 12) imposed a no-fly zone over the airspace of the Libyan Arab Jamahiriya.

As noted below, serious problems arise concerning the legitimacy of Resolution 1973/2011. It would be too simplistic to argue that as the Security Council had authorised intervention, *ergo*, military intervention was legitimate. The assumption must be that military intervention was authorised under Chapter VII of the UN Charter (“Action with respect to threats to the peace, breaches of the peace and acts of aggression”). What then of the long-established and long-cherished doctrine of non-intervention, explicitly and implicitly recognised in the UN Charter, particularly in Article 2(4), especially as this entailed external support for insurgent forces? The judgment of the ICJ in the Nicaragua Case is apposite here.<sup>23</sup>

Articles 2(4) of the UN Charter (1945) contain an explicit principle against foreign intervention in relation to “territorial integrity or political independence” while Article 2(7) extends the principle against non-intervention to “matters which are essentially within the domestic jurisdiction.” It is true that Article 2(7) goes on to enter the caveat that “this principle shall not prejudice the application of enforcement measures under Chapter VII of the Charter. On this basis it can be argued that SC Resolutions 1970 and 1973 were justified as ‘enforcement measures’. It must be noted, however, that Chapter VII enforcement action requires the explicit determination by the Security Council of “the existence of any threat to the peace, breach of the peace or act of aggression” (under Article 39). SC Resolution 1973, however, does not spell out in what manner the events in Libya came within a threat to the peace, a breach of the peace or acts of aggression. The issues relating to intervention in purely internal disputes (even when amounting to civil war) are both complex and controversial. It is submitted that in the light of General Assembly resolutions such as the *Declaration of Principles of International Law Concerning Friendly*

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Portugal and South Africa (non-permanent members). Abstentions: Russia and China (SC permanent members) Germany, Brazil and India (SC non-permanent members).

<sup>23</sup> *Nicaragua (Merits) Nicaragua v United States* ICJ Reports 1986, p14. A detailed analysis of the decision of the ICJ is not possible here but reference may be made to para 199 – 211 of the Report. A brief summary of the impact of the decision may also be found in David Harris *Cases and Materials on International Law* (London: Sweet and Maxwell, 7<sup>th</sup> ed, 2010) pp 738 – 742.



*Relations and co-Operation among States in accordance with the charter of the UN*<sup>24</sup> that the general tenor of opinion has been that internal disputes are not grounds for intervention.<sup>25</sup> In this context, the *Nicaragua v US* case is instructive. The ICJ, indeed, went even further in affirming that this constituted customary international law.<sup>26</sup>

It has been argued that there is newly evolved principle Article 2(4) would permit intervention on humanitarian grounds. These issues were explored in relation to NATO action in Kosovo in 1999,<sup>27</sup> but can hardly be said to have been completely resolved, bearing in mind the clear objections of Russia and China as well as the non-aligned grouping of States.<sup>28</sup> Gray has commented that that “the UK more than any other State has developed a doctrine of humanitarian intervention as an autonomous institution.”<sup>29</sup> In developing her objections on this issue, Gray goes on to state:

Those who support a doctrine of humanitarian intervention often rely on earlier, pre-Iraq practice. ... But in these episodes the States using force did not actually invoke a doctrine of humanitarian intervention; they preferred to reply on the better established right to self-defence. Several States said that violations of human rights could not justify the use of force. Now there is an attempt to re-write history in order to try and justify the action in Kosovo. This requires that we ignore what the States in question actually said and therefore seems inconsistent with the approach of the ICJ in the *Nicaragua* case. The Court in considering whether a new doctrine of forcible intervention to help opposition forces to overthrow the government had emerged through State practice put great stress on the fact that neither the USA itself, nor other States, had claimed such a right.<sup>30</sup>

It is submitted that the failure of the Security Council in Resolution 1973 to make explicit the basis for the intervention impugns both the initial

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<sup>24</sup> GA Resolution 2625 (XXV) 24 October 1970.

<sup>25</sup> It is conceded that an exception may require to be drawn in relation to acts of terrorism.

<sup>26</sup> *Nicaragua v United States* (Merits) (1986) ICJ Reports, p14, paras 202 – 209.

<sup>27</sup> *Legality of use of Force (Yugoslavia v Belgium) Provisional Measures*, Order of 2 June 1999; ICJ Reports (1999) p124.

<sup>28</sup> 1999 UNYB 332.

<sup>29</sup> Christine Gray “The Use of Force and the International Legal Order” in Malcolm Evans (ed) *International Law* (Oxford: OUP, 2<sup>nd</sup> edn, 2006) p 595.

<sup>30</sup> *Ibid.*

## THE LIBYAN INTERVENTION

unilateral action by France<sup>31</sup> as well as the subsequent NATO operation. It might even be conceded that a distinction needs to be drawn between military intervention (in this case the imposition of the no-fly zone) for humanitarian purposes and illegitimate interference in domestic affairs; it may be a line in the sand, but it is a line still and it is, therefore incumbent that the justification be made explicit.

Chapter VII, moreover, contains a long list of the pre-requisites and conditions attendant upon the exercise of this power. In this regard, it is submitted that the pre-requisites required by Chapter VII of the UN Charter did not exist or were not put in place. The first point to be raised relates to Article 39 of the UN Charter. This requires that the Security Council should make a prior determination of 'the existence of any threat to the peace, breach of the peace or act of aggression'. It is difficult to see how the events in Libya, brutal though Qaddafi's repression of his own people might be, constituted such a threat; at this point in time Qaddafi was not a threat to the global order (though he may have been in the past, and might conceivable be in the future). While it is true that in Rwanda it was an internal armed conflict, not an external threat, which triggered action under Article 39, the effective trigger was genocide and the impact of the internal struggle on neighbouring states. Second, Article 41, although not mandatory, recommends a consideration of 'measures not involving the use of armed force.' It is submitted that the full range of options listed in Article 41 were not effectively considered.

Third, no attempt was made by the Security Council to comply with the requirements of Articles 46 and 47, in relation to the establishment of a Military Staff Committee – an essential pre-requisite of scrutiny and accountability, especially in relation to the military rules of engagement. It is submitted that the surrender of this function to NATO, while it was pragmatic and ultimately successful, was not just a dereliction of legal duty but also unlawful under the principles of international law. It is conceded that neither Articles 46 nor 47 have played a dominant role in recent instances of Security Council interventions. Nonetheless, the continued role of the Military Staff Committee has been continually re-affirmed. Rather than being a dead-letter, the Military Staff Committee has met regularly and there is no evidence that it is not prepared to carry out the functions assigned to it under Article 47. This is made clear in Cases 18 - 21 cited in the Security Council *Repertoire*.<sup>32</sup> It should be further noted that in the Cases cited, the Russian representative took

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<sup>31</sup> *Libya: French Plane Fires on Military Vehicle*, BBC On-Line News, 19<sup>th</sup> March 2011: [www.bbc.co.uk](http://www.bbc.co.uk).

<sup>32</sup> "Relations with other United Nations Organs": [www.un.org/en/sc/reportoire/](http://www.un.org/en/sc/reportoire/) (pages 250 – 252).

the opportunity to re-iterate the role of the Military Staff Committee.<sup>33</sup> At the same time, in Case 19, the representative for China, at the Security Council's 4223<sup>rd</sup> meeting called for "the full use of the capacity of the Military Staff Committee as an important source for military expertise both for preparing for the possible deployment of an operation and for wrapping one up".<sup>34</sup>

It is in this context i.e. the attempt to locate intervention on a wide-ranging concept of humanitarianism, that it is necessary to remember that state practice has been generally hostile. The early stages of the conflict in Rwanda offer an example of this, an attitude that also appeared to be shared by high officials at the UN. As Michael Barnett notes:

There was a growing belief at the UN that its survival and the effectiveness of peacekeeping depended on honouring the principles of consent, neutrality and impartiality, which fed directly into a policy of non-use of force, even in the face of civilian killings.<sup>35</sup>

Barnett also notes that the then Secretary-General, Boutros-Ghali, as well as his successor, Kofi Annan were equally reluctant and muzzled their officials who sought to advocate a contrary view.<sup>36</sup>

It is clear that this had long been the position of the influential Group of 77. For instance, the Ministerial Declaration of Foreign Ministers of the Group of 77 (representing the opinion of 132 UN Member States), meeting on 24 September 1999 (3 months after the end of the NATO bombing campaign in Yugoslavia) had concluded:

The Ministers stressed the need to maintain clear distinctions between humanitarian assistance and other activities of the United Nations. They rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or international law.<sup>37</sup>

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<sup>33</sup> Ibid; S/PV.4220, p9 (Case 18);S/PV.4257 (resumption 1, p13 (Case 20); S/PV.4343, p 6 (Case 21).

<sup>34</sup> Ibid; S/PV.4223, p15 (Case 19).

<sup>35</sup> Michael Barnett *Empire of Humanity: A History of Humanitarianism* (New York: Cornell University Press, 2011) p 181.

<sup>36</sup> Ibid, p 184.

<sup>37</sup> Cited in Ian Brownlie *Principles of Public International Law* (Oxford: Oxford University Press, 7<sup>th</sup> edn, 2008) p 744. This also appeared to be position taken subsequently by the United States, in the early stages of the conflict in Rwanda, as documented by Samantha Power *A Problem from Hell: America in an Age of Genocide* (New York: Norton, 2002).

## THE LIBYAN INTERVENTION

In the case of Libya, it should be remembered that at the point when it had already become abundantly clear that Qaddafi was engaged in the brutal and bloody assault on Libyan protesters, the initial US position was of reluctance and even down-right hostility to the suggestion of intervention. The US Defence Secretary, Robert Gates dismissed the notion, out of hand, that there should be even the imposition of a no-fly zone.<sup>38</sup>

### 4. R2P AND THE SPECIAL STATUS OF HUMAN RIGHTS LAW

For present purposes, the following definition of humanitarian intervention may suffice: it is

“the treat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied”.<sup>39</sup>

To put it simply, if a state cannot, or refuses to, accord to its citizens their fundamental and universal human rights, then “the duty to safeguard these rights reverts to the international community.”<sup>40</sup> It is implicit in arguments of this nature (not shared globally) that human rights law must be acquired a primacy that trumps all other concerns of international law and politics.

The doctrine of humanitarian intervention has had a chequered history, based upon suspicion of Big Power politics, as well as the inevitable fact that ‘humanitarian’ intervention too often results in further counter-productive violence and bloodshed. Michael Barnett expresses it thus:

...the history of humanitarianism is littered with violent actions in the name of humanity. ... Today humanitarian intervention valorizes military force to protect the “people”, intimating that such violence is “responsible” and that failure to use violence to protect the weak is an “irresponsible” or immoral act that creates something close to a moral equivalence between perpetrator and the bystander. My point is not to

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<sup>38</sup> Statement of Robert Gates, US Defence Secretary, “No-fly zone for Libya would Require Attack” [www.reuters.com/article/2011/03/02/us-libya-usa-pentagon-idUST](http://www.reuters.com/article/2011/03/02/us-libya-usa-pentagon-idUST).

<sup>39</sup> J L Holzgrefe, “The Humanitarian Intervention Debate”, in J L Holzgrefe and R.O Keohane (ed) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003) p 18.

<sup>40</sup> *Ibid*, p 42.

reproach humanitarian intervention – I find it impossible to contemplate the killings in Rwanda, Darfur, and the Congo without demanding the deployment of all necessary means – but rather to point out that doctrines of humanity have always demanded their share of violence. Given humanitarianism’s history, there is no reason to bet on a different future.<sup>41</sup>

Even in those, albeit exceptional situations where it can be conceded that humanitarian intervention may be necessary and even justified,<sup>42</sup> a further central issue of concern remains: is humanitarian intervention ever possible without regime change? And if the ultimate primacy of purpose is, indeed, regime change, how can this be squared with the provisions of the UN Charter and with the fundamental realities of global politics? It is submitted that it was the concerns expressed regarding the legality of humanitarian intervention that has led to its basic substance being re-cast as the ‘Responsibility to Protect Doctrine’ (reduced to R2P for the age of Twitter and text-speak).

The UN General Assembly adopted R2P in an unanimous resolution (UNGA Resolution 60/1, 2005) as a part of the then UN Secretary-General Kofi Anan’s reform agenda, in particular to manoeuvre around the obstacle of inviolable state sovereignty:

... if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity.<sup>43</sup>

This was echoed by the work of the International Commission on Intervention and State Sovereignty (ICSS) which has advocated “a transition from a culture of sovereign *impunity* to a culture of national and international *accountability*.” To put it in other terms, R2P necessitated a move from ‘sovereignty as control’ to ‘sovereignty as responsibility’. The ‘pillars’ of R2P may be set out as follows:

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<sup>41</sup> Michael Barnett *Empire of Humanity: A History of Humanitarianism* (New York: Cornell University Press, 2011) p236.

<sup>42</sup> See, for instance, Steven Haines “Humanitarian Intervention: Genocide, crimes against Humanity and the Use of Force” in G Kassimeris and J Buckley (eds) *Ashgate Research Companion to Modern Warfare* (Farnham: Ashgate, 2010) p 307.

<sup>43</sup> *Millennium Report*, UN GA 2000.

## THE LIBYAN INTERVENTION

1. A State has responsibility to protect its population from mass atrocities.
2. The international community has a responsibility to assist the State if it is unable to protect its population on its own.
3. If a State fails to protect its citizens from mass atrocities and peaceful measures have failed, the international community has the responsibility to intervene through coercive measures.

These pillars, therefore, have the unavoidable corollary that military intervention must remain the last resort.

Prior to Libya, the intervention in the former Yugoslavia, had been the model held up for praise. The NATO bombing of Yugoslavia, commencing on 24 March 1999 was based on the claim that it was necessitated by humanitarian objectives. Needless to say, there is no common agreement among international lawyers.<sup>44</sup> Ian Brownlie, for instance, is of the clear view that,

... the authenticity of the subsequent claims that the action had humanitarian motives is substantially undermined by the fact that, beginning in October 1998, the threats of force were linked directly to a collateral political agenda, that is, the acceptance by Yugoslavia of various *political* 'demands concerning the status of Kosovo, these 'demands' being presented under threat of a massive bombing campaign.<sup>45</sup>

It is possible to re-cast the same argument in the context of Libya: intervention in Libya, rather than being motivated by a humanitarian impulse was instead pre-determined by a desire to remove Qaddafi. To put it bluntly: this was regime change, pure and simple. Just as in Kosovo, military intervention may have been morally justified, but was it legally justified? Anne-Marie Slaughter (former Head of Policy Planning, US State Department) put the case for intervention succinctly, drawing on the failure to prevent genocide in Rwanda and the perceived success of intervention in Kosovo: "The international community cannot stand by and watch the massacre of Libyan protesters. In Rwanda we watched. In Kosovo we

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<sup>44</sup> There is a considerable literature, in international law and politics, as well as in the field of ethics and morality, on this issue. It is not possible to details these here. However, a useful starting point would be the collection of essays by Holzgrefe and Keohane, *ibid*, as well as in the standard textbooks of Public International Law.

<sup>45</sup> Ian Brownlie *Principles of Public International Law* (Oxford: Oxford University Press, 7<sup>th</sup> edn, 2008) p 742 – 743.

acted.”<sup>46</sup> These sentiments were echoed by Hilary Clinton, US Secretary of State: “We learned a lot in the 1990s. We saw what happened in Rwanda.”<sup>47</sup> This represents a noticeable theme, that of atonement for the failure to intervene in Rwanda, in the debates surrounding the Libyan intervention. As Michael Barnett puts it, Rwanda haunts the international community:

...it is because “our” complicity is undeniable. It was not only the killing that was shocking. So, too, was the West’s apparent indifference. There certainly have been many other moments when the West has chosen to ignore mass killings, but never before when there were 2,5000 UN troops on the ground. ... In other words, the West had blood on its hands. Choosing not to act when it had knowledge and opportunity to stop a genocide, according to many, was tantamount to contributing to genocide itself.<sup>48</sup>

The Responsibility to Protect (R2P) doctrine, in the way it played out in Libya was in many ways unique and this is an essential factor to weigh in the balance of its legitimacy. For a start, R2P in Libya took place in the context of the wider events in the Arab world, where it appeared that a ‘Berlin Wall – domino effect’ would leave the adherents of humanitarian intervention, and the West generally, floundering. “Libya presented an opportunity to join a battle that appeared to pit popular will against evil regime, and to emerge on the right side of history.”<sup>49</sup> Crucially, it offered an opportunity to ameliorate the downright hostility in the Arab world consequent upon the war in Iraq:

...western intervention so soon after Iraq would require Arab support. That too was on the table, but again was driven by more than just humanitarian considerations. It is hard to think of a case other than Libya, and a moment in time other than March 2011, where so many Arab countries would have either supported, or abstained from objecting to, Western-led action in a Muslim and Arab country.<sup>50</sup>

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<sup>46</sup> [www.thecable.foreignpolicy.com/posts/2011/02/24anne\\_marie-slaughter](http://www.thecable.foreignpolicy.com/posts/2011/02/24anne_marie-slaughter).

<sup>47</sup> [www.blogs.state.gov/index.php/site/entry/clinton\\_gates\\_libya](http://www.blogs.state.gov/index.php/site/entry/clinton_gates_libya).

<sup>48</sup> Michael Barnett *Empire of Humanity: A History of Humanitarianism* (New York: Cornell University Press, 2011) pp 183 – 184.

<sup>49</sup> Lin Noueihed and Alex Warren *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of New Era* (New Haven, USA: Yale University Press, 2012) p181.

<sup>50</sup> *Ibid*, p181.

## THE LIBYAN INTERVENTION

And what was true of the Arab world was true also of the two major obstacles to intervention on the Security Council: China and Russia. Unlike the worsening situation in Syria, Libya no longer had friends it could count on when the Security Council was seized of the matter; Qaddafi had effectively burnt his bridges.

In the final analysis, what are we to make of R2P intervention? It may be that it is the very nature of 'R2P' terminology itself that stands as an obstacle to its proper evaluation. It also begs the question as to whether R2P is anything other than 'humanitarianism', in the sense that earlier generations of political scientists and international lawyers would have used that term. It is, of course, true that humanitarianism (especially in its oft-cited guise of *liberal* humanitarianism) has become too-much freighted with unnecessary baggage.<sup>51</sup> Nonetheless, it is worth reiterating that the critical change has been the paradigm shift from a 'right' to intervene (based on self-justifying notions of 'Western' superiority carried over from a colonialist mind-set) towards a focus on the 'duty' to intervene. The latter finding expression from a fundamental shift towards an acknowledgement of the special place of human rights law in the global legal order.

In the context of global politics in the 21<sup>st</sup> Century, the fall of Tripoli was "the first unambiguous military enforcement of the Responsibility to Protect norm; Qaddafi's utter defeat seemingly putting new wind in the sails of humanitarian intervention."<sup>52</sup> This begs any number of questions; the most important is the overweening claim that R2P represent a new *norm* of international law.

It is also worth noting the high causality rate. As always, accurate figures are impossible to verify. One source indicates that somewhere between 30,000 and 50,000 Libyans had been killed six months after R2P intervention was launched and that,

Measured as a percentage of Libya's population, and in that time period, this was a bloodier death toll than Iraq.<sup>53</sup>

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<sup>51</sup> These issues are further discussed in: Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Ithaca and London: Cornell University Press, 2011) p 230.

<sup>52</sup> Stewart Patrick, 2011, ex-US State Department.

<sup>53</sup> Lin Noueihed and Alex Warren *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of New Era* (New Haven, USA: Yale University Press, 2012) p 185.



## 5. NORTH ATLANTIC TREATY ORGANISATION (NATO)<sup>54</sup>

NATO's military intervention in Libya has been trumpeted as a great success, both for NATO itself as well as for global peace and security:

NATO's operation in Libya has rightly been hailed as a model intervention. The alliance responded rapidly to a deteriorating situation that threatened hundreds of thousands of civilians rebelling against an oppressive regime. It succeeded in protecting those civilians and, ultimately, in providing the time and space necessary for local forces to overthrow Muammar al-Qaddafi. And it did so by involving partners in the region and sharing the burden among the alliance's members.<sup>55</sup>

Nonetheless, while there may be sufficient justification in lauding the operation from the point of view of global political security, serious questions remain in the sphere of International Law, particularly on the issue of whether the operation moved beyond 'protective' to become 'active'. There is documented evidence of western special forces engaged in operational military activity.<sup>56</sup>

NATO (founded in 1949) has moved far beyond its original role to oppose and deter the power of the former USSR (its counterpart in Eastern Europe, the Warsaw Pact, was founded in 1955 and disbanded in 1991). The active expansion of NATO away from its original aims is illustrated in the fact that the first actual use of force by NATO was in Bosnia in 1994, followed by Kosovo in 1999. A key development lies in the procedures designed for 'dual control'. In Bosnia, for instance, these dual arrangements gave the UN control over NATO's actions. Similarly, in Afghanistan, the International Security Assistance Forces (ISAF) operates under NATO leadership despite the fact that approximately 18 non-NATO states (including Australia, New Zealand and Jordan) contribute armed forces to ISAF.

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<sup>54</sup> It is not possible, at this stage to provide a detailed account of the role of NATO in Libya. A brief overview may, however be obtained in, Joshua Goldstein and Jon Pevehouse, *International Relations* (London, Pearson, 10<sup>th</sup> edn, 2012).

<sup>55</sup> Ivo Daalder and James Stavridis, "NATO's victory in Libya: The Right Way to Run an Intervention (*Foreign Affairs*; [www.foreignaffairs.com/articles](http://www.foreignaffairs.com/articles)) March / April 2012.

<sup>56</sup> *The Guardian*, 30 May 2011, "Al-Jazeera footage captures Western troops on the ground."

## THE LIBYAN INTERVENTION

The NATO military intervention in Libya (code-named 'Operation Unified Protector') needs to be seen in the context of this evolution of NATO's role, in particular, its relationship with the UN and any mandate it might receive from the Security Council.<sup>57</sup> NATO's seven-month intervention in Libya began on 31 March 2011 with taking control of all military operations for Libya under resolutions 1970(2011) and 1973 (2011). It should be noted, however, that NATO only took over formal oversight of the operations *after* the United States, the UK and France had already initiated a no-fly zone and an arms embargo. The operations ended on 31 October 2011. In addition to its active military involvement, NATO Operation Unified Protector supported the implementation of the arms embargo and the enforcement of the no-fly zone through the verification of shipping activities both within and outside of Libyan territorial waters.

There are a number of issues that need debate. The first relates to the legitimacy of any Security Council delegation to NATO. Second, NATO's mandate was for an air presence over Libya and off-shore naval action. This did not, either explicitly or implicitly, authorise an extension to ground troops. Third, it was clear that NATO's operations morphed from protection of civilians to direct, military assistance to a number of armed 'rebel' groups. The latter would be considered as combatants under International Law concerns scrutiny and accountability; it is clear that this was not a matter that was either debated or even considered by the Security Council. Fourth, there are real concerns regarding the lack of oversight, in terms of the command structure, exercised by the Security Council over NATO. This leads on to the fifth issue, of scrutiny and accountability. Civilian casualties (over 1,100 deaths and 4,500 wounded) are directly attributed to the NATO action and there has been an acknowledgement of weapons systems failures and accidental killing of rebels. None of these issues has been sufficiently considered or clarified.

### *The Command Structure in NATO's Libyan Operation*

The U.S. Permanent Representative to NATO Ivo H. Daalder and top NATO commander Admiral James Stavridis trumpeted the Libya operation as "a model of intervention."<sup>58</sup> They argue that the mission protected thousands of lives, minimized collateral damage, and enabled the overthrow of one of the world's most oppressive regimes and without a single allied casualty:

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<sup>57</sup> Further reference may be made to: Paul Belkin *Report: NATO's Chicago Summit* (Congressional Research Services) ([www.crs.gov](http://www.crs.gov); R42529) 14 May 2012.

<sup>58</sup> [www.foreignaffairs.com/articles/137073/ivo-h-daalder-and-james-g-stavridis/natos-victory-in-libya](http://www.foreignaffairs.com/articles/137073/ivo-h-daalder-and-james-g-stavridis/natos-victory-in-libya).

"When a group of countries wants to launch a joint intervention as a coalition--which confers political legitimacy--only NATO can provide the common command structure and capabilities necessary."<sup>59</sup>

These sentiments, however, disguise the initial lack of coherence and a clear vision of the military intervention. The lack of clarity with regard to the early stages of the operation cannot be better illustrated by the fact that the major participants could not even agree on a codename for the operation: the US, French and UK. The unprecedented, three-pronged command is reflected in the different names for the operation: the French called it *Harmattan* (the name of a hot wind that blows over the Sahara); in Britain, it was Operation Ellamy; and in the US, it was Odyssey Dawn. What was clear, however, was that, even within the ranks of NATO allies, there was a measure of opposition to NATO control. It was reported that French President Nicolas Sarkozy initially opposed not just the proposal that NATO would take control but even the very involvement of NATO, on the grounds that this would send the wrong message to Arab nations. Similarly, Turkey, angered by the fact that the French President had failed to invite it to attend a crucial summit meeting, had refused to give carte blanche to the NATO imposition of a no-fly zone over Libya.<sup>60</sup> Western diplomats were reported as saying that Sarkozy angered Britain and the US by announcing French planes were already in the air and ready to attack Libya before many of his allies had even decided on military action, and before informing his partners.<sup>61</sup>

### *Legitimacy of the NATO Involvement*

What criteria are we to use when adjudicating on the crucial issue raised here: was the NATO intervention 'legitimate'? If the only criterion was whether it had received the approval of the UN, though the Security Council, then the question is easily answered. This, however, is to set the standard too low. In post-conflict Iraq, the much-trumpeted test was that elections had taken place. This criterion is similarly beset with difficulty. The holding of elections says nothing about corruption, the deadening hold of tribal and clan loyalties or of the protection of civil liberties (especially the protection of the rights of women and of religious and racial minorities). In the West, too, there is the added fear that the parties that win these elections, primarily the Muslim

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<sup>59</sup> Ibid.

<sup>60</sup> Kim Willscher, "Sarkozy Opposes NATO taking control of Libya operation: Dissent from Germany, Turkey and Norway leaves question marks over command structure" ([www.guardian.co.uk](http://www.guardian.co.uk); 22 March 2011).

<sup>61</sup> Ibid.

## THE LIBYAN INTERVENTION

Brotherhood may not form governments much to liking of western chancelleries.

It is also clear that dissenting voices are making themselves heard on the ‘blogosphere’ and internet. *YouTube* video clips publicise the fatalities caused by the military intervention in particularly gruesome detail<sup>62</sup> while radical and alternative voices refer to: “The U.S./NATO conquest of Libya [as] another step in a new scramble for Africa, this time with the U.S. rather than the European powers in the lead”.<sup>63</sup> These detractors may, in the West, represent the views of a minority but there is the very real possibility that these views exert an appeal in those parts of the Middle-East pre-disposed to view such interventions with suspicion and dread. These are, ultimately, markers for any future intervention which the international legal order cannot afford to ignore.

### *Non-compliance*

There are real concerns regarding compliance with the relevant resolutions, and with the provisions of the UN Charter with regard to the provision of arms and munitions to rebel forces and, in particular, to the use of ground forces by both NATO as well as non-NATO forces. It appears, for instance, that that in a clear breach of the SC Resolutions, French forces had airlifted weapons to insurgents while Qatari troops had been involved in training rebel troops as well as assisted in direct fighting.<sup>64</sup> A useful indicator lies in the report of the Committee of Experts (see below) set up to scrutinise operations under the Security Council Resolutions and to consider issues of non-compliance.

## 6. COMMITTEE OF EXPERTS

One facet of Security Council Resolution 1970 (2011) deserves greater attention and scrutiny. Paragraph 24 of the Resolution specifically called for the creation of a Committee of Experts to oversee the relevant sanctions measures. The mandate of the Committee of Experts was subsequently expanded by Resolution 1973. The tasks of the Committee were set out in paragraph 24 as follows:

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<sup>62</sup> [www.youtube.com/yayyisse](http://www.youtube.com/yayyisse).

<sup>63</sup> *Liberation: Newspaper of the Party for Socialism and Liberation* ([www.pslweb.org/liberationnews](http://www.pslweb.org/liberationnews)).

<sup>64</sup> Lin Noueihed and Alex Warren *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of New Era* (New Haven, USA: Yale University Press, 2012) p 185.

24. Requests the Secretary-General to create for an initial period of one year, in consultation with the Committee, a group of up to eight experts ("Panel of Experts"), under the direction of the Committee to carry out the following tasks:

- (a) Assist the Committee in carrying out its mandate as specified in paragraph 24 of resolution 1970 (2011) and this resolution;
- (b) Gather, examine and analyse information from States, relevant United Nations bodies, regional organisations and other interested parties regarding the implementation of the measures decided in resolution 1970 (2011) and this resolution, in particular incidents of non-compliance;
- (c) Make recommendations on actions the Council, or the Committee or State, may consider to improve implementation of the relevant measures;
- (d) Provide to the Council an interim report on its work no later than 90 days after the Panel's appointment, and a final report to the Council no later than 30 days prior to the termination of its mandate with its findings and recommendations;

The Committee presented its Report to the Secretary General on 17 February 2012.<sup>65</sup> While it is not possible at this stage to deal with the intricate detail of the Report, some of its main findings may profitably be set out.

The important point to be made was that the Report makes it clear that NATO-led forces, and others, had directly transferred military related materiel to the anti-Qaddafi rebels:

During the Panel's visits to Benghazi in July 2011, Libyan opposition military sources, as well as international observers, explained to the Panel the difficulties that revolutionary forces had been facing in terms of military combat: the lack of weapons and ammunition, the lack of organization and the difficulty of communicating across a single and between the different fronts of the conflict, as well as the lack of experience of the majority of civilians who took up arms against the Qadhafi [sic] forces. While the opposition gained more experience and organized itself better with time, and seized increasing numbers of weapons from Qadhafi's bunkers and forces, Libyan sources also explained that foreign military support, including deliveries of military materiel, had been crucial.<sup>66</sup>

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<sup>65</sup> S/2012/163 ([www.un.org/sc/committees/1970/](http://www.un.org/sc/committees/1970/)).

<sup>66</sup> Ibid, para 71.

## THE LIBYAN INTERVENTION

It is submitted that the actions of the British, the French, the Italians and the United States in supplying military *materiel* as well as military advice and personnel to the rebels, went beyond the letter no less than the spirit of the Security Council Resolutions.<sup>67</sup> Moreover, in a foretaste of what was to come, supplies were also made to the National Transitional Council, thus creating a dynamic of irreconcilable tension between the NTC and the *ad hoc* rebel groups.

Moreover, this extended to military and strategic advice and secondment of military advisers. This was true of all NATO allies, particularly of the United Kingdom, as the Report makes clear:

83. In a letter dated 26 April 2011 (S/2011/269), the United Kingdom notified the Secretary-General of the United Kingdom's intention to supply personal protective equipment to the National Transitional Council as well as the provision of a small team of military advisers to mentor and advise the National Transitional Council headquarters on how it might organize its internal structures, prioritize its resources and improve communications. On 25 October 2011, the United Kingdom notified the Committee in accordance with paragraph 13 of Security Council resolution 2009 (2011) of the United Kingdom's intention to provide a military assistance team to the Libyan authorities for the purposes of providing operational assistance, training and mentoring on security issues, including reform of the armed services, counterterrorism and counter-insurgency.<sup>68</sup>

The direct military involvement also came from the United Arab Emirates, particularly Qatar and Saudi Arabia.<sup>69</sup> It is not any wonder that some members of the Security Council, primarily Russia and China, have come to regret the fact that they did not exercise their power of veto, a crucial factor with regard to their reluctance to approve Security Council action in Syria.

## 7. WIDER IMPLICATIONS OF THE LIBYA INTERVENTION

There cannot be any doubt that the massive proliferation of weapons and ammunition in the Libya intervention has seeped into neighbouring states,

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<sup>67</sup> Ibid. The Committee of Expert's findings on this point are set out in para 76 – 78 (France); para 79 – 81 (Italy); para 82 – 84 (United Kingdom); and para 85 (United States).

<sup>68</sup> Ibid.

<sup>69</sup> Ibid, para 86.

particularly Mali, Niger, Chad and Mauretania. In addition, the exodus of return of migrants from Libya, some of them mercenaries formerly employed by the regime has fuelled instability, criminality and political upheaval with potentially far-reaching consequences. As the Security Council's Committee of Experts has reported:

While it is difficult to assess the precise impact of the Libyan crisis on these areas, the fact-finding missions conducted by the Panel in the region indicate that armed insecurity in neighbouring countries such as northern Mali and northern Niger has risen recently, with increased levels of weapons trafficking, armed robberies, terrorist activity and the resumption of insurgent movements. The Panel believes that the proliferation of weapons originating from Libya is exacerbating the already precarious security situation in certain parts of the region and that careful monitoring and enforcement of the arms embargo are therefore critical.<sup>70</sup>

The Committee further reports:

The fragile infrastructure of these states has been severely challenged in the peripheries by the mixture of large numbers of returnees, loss of remittances, weapons influxes, and the withdrawal of international aid, itself a result of increased insecurity. As a result, pre-existing conflicts have resurged, new armed opposition groups have emerged, and greater space for terrorist organizations and international criminal networks has opened.<sup>71</sup>

On the other hand, and in the interest of balance, the removal of Qaddafi has also had the beneficial effect of removing a destabilizing force in the wider region. As a specific instance, the Committee of Experts reported that the Sudan,

...expressed relief that a long-term sponsor of instability in its country was removed and predicted that peace-making efforts in Darfur would improve as a result.... and arms proliferation, while worrying, was

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<sup>70</sup> S/2012/163 ([www.un.org/sc/committees/1970/](http://www.un.org/sc/committees/1970/)), from the Summary of the Report, p 6.

<sup>71</sup> Ibid, para 29.

## THE LIBYAN INTERVENTION

offset by the removal of Libya as a long-term future sponsor of armed opposition in the Sudan.<sup>72</sup>

On many levels, Libya represents a success of interventionist global policy: “in theory, Libya has achieved the most far-reaching change of any country in the Arab Spring.”<sup>73</sup>

Perhaps the ultimate achievement of the intervention in Libya is that it has crafted an interpretation of the responsibility to protect doctrine that will serve as a marker for the future, despite all the complexity and ambiguity that the doctrine carries with it. It may be that the critics of R2P are right: the Libya intervention was nothing more than a line drawn on shifting sands; but it is a line, nonetheless.

Significantly, the voluminous discussion of the legitimacy of the intervention in Libya cannot, and should not, detract attention from the democracy-affirming nature of the events of the Arab Spring and its accompanying grant of a new dignity to the peoples of this region. Perhaps the first attempt to ‘audit’ issues of good governance in the Arab world came in the form of the 2002 Arab Development Report (under the aegis of the United Nations).<sup>74</sup> The Report outlined three major ‘deficits’ that operated to handicap development and progress. The first was the freedom deficit; the second, the women’s empowerment deficit; and the third was the knowledge deficit. It is submitted that amongst the details of the academic and political critique, the legitimacy of the Libyan intervention will ultimately be tested by whether these deficits are overcome.<sup>75</sup>

## 8. POSTSCRIPT

The recent history of post-conflict states is not a happy one. The legitimacy of intervention needs considerable re-evaluation in the light

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<sup>72</sup> Ibid, para 28.

<sup>73</sup> Lin Noueihed and Alex Warren *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of New Era* (New Haven, USA: Yale University Press, 2012) p 166.

<sup>74</sup> *Arab Human Development Report 2002*, pp 27 -29. The most recent report (2012) is entitled Empowerment: *The Will of the People*, [www.arab-hdr.org](http://www.arab-hdr.org) (accessed 18 July 2012).

<sup>75</sup> For a further discussion, reference may be made to: Lin Noueihed and Alex Warren *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of New Era* (New Haven, USA: Yale University Press, 2012). For a report on the moves towards the empowerment of both women voters as well as women politicians, reference may be made to Christopher Stephen, “Candidates belatedly realise that women could hold the key to their futures”, *The Observer*, 8 July 2012.



of the slow progress in states as diverse as Bosnia (and the other states of the former Yugoslavia), Iraq and Afghanistan. It would not be unduly pessimistic to describe these states as not fully engaged with the ideals and processes of a functioning and accountable democracy. While Qaddafi's rule is over, and his family and cronies face the inevitable process of accountability, the legitimacy of the Libya 'adventure' will ultimately rest on whether there is a successful transition to a functioning and fully-operational democracy. While it is true that democratic elections have taken place, commentators have pointed to a number of factors that have the potential to escalate.<sup>76</sup>

In no particular order these include, first, the psychological vacuum left by the removal of Qaddafi's personality cult; it is unlikely that the succeeding politicians will meet this. As Pargeter puts it, "getting over a leader as all-encompassing as Qaddafi is not going to be easy."<sup>77</sup> Second, the civil war and the intervention has devastated the oil production, the main source of revenue. As the experience of Iraq indicates, returning to a fully-functioning economy will require both time and expertise. Third, tens of thousands of Libyans have been killed or seriously injured, creating a legacy of suspicion and hatred. The process of peace and reconciliation will, inevitably, be a long and difficult one. Fourth, the tribal-clan fragmentation of Libyan society has already been noted above. Unless the newly-elected politicians can manage to reach out in a spirit of inclusiveness and manage these conflicting loyalties, there is a real danger that Libya could split apart in the process of 'Balkanisation' witnessed, with horrendous consequences, in the former Yugoslavia. Pessimistically, as in Iraq and Egypt, it is unlikely that any of the newly-elected politicians have the necessary charisma and ruthlessness to match Qaddafi's bizarre brand of 'Big Man-Strong Arm' control.

Finally, and by no means exhaustively, the question arises as to whether the international community will be either willing or capable of continued monitoring of events in Libya. Unlike Bosnia and Kosovo, there seems little possibility of a NATO peacekeeping force, while the

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<sup>76</sup> Max Boot (Jeane J Kirkpatrick Senior Fellow for National Security Studies) Council on Foreign Relations ([www.cfr.org/libya/libyas-problems-far-over](http://www.cfr.org/libya/libyas-problems-far-over)) 24 August 2011.

<sup>77</sup> Pargeter, above, p256.

## THE LIBYAN INTERVENTION

wider events in the region (particularly in Syria and Mali, and the after-effects of the allied withdrawal from Iraq and Afghanistan) may indicate that it is not a fore-gone conclusion that there may yet exist a failed state in this strategic part of the Middle-East-Mediterranean.